No. 93-1875

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

R. H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Our petition seeks review of the court of appeals' ruling that government attorneys who acted in good faith during litigation against respondent nevertheless committed fraud on the court. As we explain in the petition, that ruling cannot be squared with the language of Fed. R. of Civ. P. 60(b) and the decisions of eight other judicial circuits. The decision below not only creates conflicting legal standards among the circuits, but it will also spawn new litigation over old cases. Because Rule 60(b) allows a court to overturn a final judgment for fraud on the court at any time, the court of appeals' decision will broadly undermine the finality of judgments.

a. Respondent turns to the issue presented in our petition only in the latter pages of his brief. He attempts to distinguish the numerous conflicting decisions based on the subject matter of this particular suit. According to

respondent, the court of appeals properly applied a different standard for fraud on the court in this case than it would have employed in a case "involving routine civil litigation between private parties" (Br. in Opp. 26), because the denaturalization and extradition proceedings are "quasi-criminal" in nature and they involve government attorneys (*id.* at 27-28).

Respondent's effort to bridge the conflict created by the court of appeals' decision ignores a fundamental fact—the court did not rely on any such distinction. Instead the court invoked its general power, recognized in Rule 60(b), to redress fraud on the court. See Pet. App. 25a-26a, 41a-42a. And the general principle the court announced is incorrect. Simply put, a party—whether governmental or private, whether acting in a criminal, "quasi-criminal," or civil capacity—cannot commit fraud on the court unless that party acts with fraudulent intent. Here, the special master found that the government attorneys "acted in good faith," *id.* at 263a, and the court of appeals did not disturb that finding, see *id.* at 25a-26a. In every other court of appeals that has addressed the question, the special master's finding of good faith would compel the conclusion that the government did not commit fraud on the court. See Pet. 15-17.[1]

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[1] Respondent takes issue (Br. in Opp. 1 n.1) with our statement (Pet. 12) that the court of appeals did not disturb the special master's finding that the government attorneys acted in good faith. Fed. R. Civ. P. 53(e)(2) requires the court of appeals to "accept the master's findings of fact unless clearly erroneous." The court of appeals acknowledged its obligation under Rule 53(e)(2) (see Pet. App. 5a), and it accepted the special master's findings, including the finding that the government attorneys acted in good faith. In particular, the court took as a premise for its decision "the Special Master's finding of no deliberate or wilful failure to disclose information arising from an evil motive." Pet. App. 25a-26a. Although the court suggested that the government attorneys had deliberately withheld information, it "accept[ed] as true that no OSI attorney deliberately withheld from [respondent] or the court information that he believed he had a duty to disclose" (*id.* at 26a).

b. None of the specific factors that respondent cites can convert good faith conduct into fraud on the court. Respondent correctly observes (Br. in Opp. 28) that government attorneys have an obligation to adhere to the highest standards of conduct, but that obligation should not expose government attorneys to censure for committing fraud on the court when they acted without fraudulent intent. Respondent's related observation that some of the conflicting cases we cite did not involve attorneys (*id.* at 29) also misses the point. The question in every case is whether a participant in the litigation intended to deceive the court. If the participants acted in good faith, then the courts should not use the doctrine of fraud on the court to reopen long final judgments.[2]

c. Respondent argues (Br. in Opp. 31-33) that the court of appeals' use of a standard that allows a finding of fraud on the court based on a "reckless indifference" to the truth is consistent with common law definitions of fraud and thus is appropriate in setting the standard for fraud on the court. We

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[2] Respondent notes (Br. in Opp. 27) that the court of appeals invoked this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963), and that *Brady* employs an objective standard. But not every *Brady* violation constitutes fraud on the court; at a minimum, the government must intentionally violate its *Brady* obligations. See Pet. 20 n.15. In this case, the United States supported Israel's extradition request on the basis of sworn affidavits and testimony of six survivors of the Treblinka death camp who identified respondent as a Ukrainian guard named Ivan who operated the gas chambers. Pet. 4. That testimony amply established probable cause justifying respondent's extradition. Hence, even if the information involved here had been admissible in the extradition proceeding (see *Collins* v. *Loisel*, 259 U.S. 309, 315-317 (1922)), it would not have affected the outcome of that proceeding. See *Glucksman* v. *Henkel*, 221 U.S. 508, 512 (1911). See Pet. 20-22. Respondent's theory that the government attorneys broke a discovery "promise" (Br. in Opp. 30, citing *United States* v. *Throckmorton*, 98 U.S. 61 (1878)) is similarly without merit and was specifically rejected by the special master. See Pet. App. 254a-255a.

disagree with that argument for reasons summarized in our petition (at 17-22). As we explain therein, Fed. R. Civ. P. 60(b) differentiates between fraud on the court, which may be raised at any time, and "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct," which must be raised within one year of judgment.[3] Moreover, the court of appeals' definition of recklessness conflicts with settled law regarding the scienter required to show even common law fraud. Under the common law test for reckless misrepresentation, a party commits fraud if "being *conscious* that he has neither knowledge nor belief in the existence of the matter *he chooses to assert it as a fact*." Restatement (Second) of Torts § 526, comment e (1977) (emphasis added).[4]

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[3] Recognizing that distinction, courts of appeals have consistently stated that fraud on the court requires proof of a deliberate scheme to defraud. See, *e.g.*, *Abatti* v. *C.I.R.*, 859 F.2d 115, 118 (9th Cir. 1988); *Great Coastal Express, Inc.* v. *International Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982), cert. denied, 459 U.S. 1128 (1983). Only the Third Circuit has suggested that a party who acted recklessly can be found to have committed fraud on the court, and that court held only that a misrepresentation made with "callous disregard" of the record can support such a finding. See *Virgin Islands Housing Auth.* v. *David*, 823 F.2d 764, 767 (3d Cir. 1987).

[4] See, *e.g.*, *Sandberg* v. *Virginia Bankshares, Inc.*, 979 F.2d 332, 345 (4th Cir. 1992); *Nickerson* v. *Matco Tools Corp.*, 813 F.2d 529, 531 (1st Cir. 1987); *Edwards* v. *Travelers Insurance*, 563 F.2d 105, 111 (6th Cir. 1977); see also 3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions* § 83.05 (4th ed. 1987); cf. Model Penal Code § 2.02(c) (1962). The court of appeals instead relied on the definition of recklessness contained in a comment to the Restatement (Second) of Torts § 500 (1965), which addresses "Reckless Disregard for Safety"—not misrepresentation. See Pet. App. 26a. By employing the objective standard of recklessness articulated in that quite different setting, the court of appeals has allowed a finding of fraud on the court to rest on mere negligence. See 2 F. Harper, F. James, Jr. & O. Gray, *The Law of Torts* § 7.3, at 391-392 (2d ed. 1986).

In this case, the special master found—and the court of appeals did not dispute—that the government attorneys "did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance. Although they were blinded to what we now perceive to be the truth, they were not willfully blind." Pet. App. 263a. Those findings preclude the conclusion that the government attorneys acted with conscious disregard for the truth. Thus, even if "recklessness" could constitute fraud on the court within the meaning of Rule 60(b), the government attorneys were not reckless.

2. Although respondent eventually engages our legal arguments with the contentions we have just addressed, he expounds first and foremost upon the "grave injustice" (Br. in Opp. 2) that he claims to have suffered in this case. Respondent's emotive accusations are not well founded in fact and in no way diminish the need for this Court's review of the important legal issue that we present. Respondent's lengthy narrative simply seeks to revive factual contentions that the special master put to rest.

a. Respondent challenges our statement that he, "like other Soviet soldiers captured by the Germans, had been transferred to an SS training camp in Trawniki, Poland." Br. in Opp. 1 n.1, quoting Pet. 2. His denial that "he had ever been at the Trawniki training camp or the Sobibor death camp" (Br. in Opp. 1 n.1) is flatly contradicted by the evidence and previous judicial findings. In the denaturalization proceedings, the district court determined that respondent's Trawniki identification card established that he served at Trawniki, and the court of appeals affirmed that finding. See *United States* v. *Demjanjuk*, 518 F. Supp. 1362, 1385-1386 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982). After extensive litigation, the Israeli courts

reached the same conclusion.[5] Most recently, the special master found that "[n]othing uncovered in these proceedings, or, indeed, in the twelve years since Judge Battisti's decision in the denaturalization case, has cast any substantial doubt on his finding that [respondent] served in the German SS at the Trawniki training camp." Pet. App. 266a.[6]

b. Respondent's account of the government's purported misdeeds—in which he cites "ten examples" of "misconduct and fraud" (Br. in Opp. 3)—basically rests on the contention that government attorneys concealed documents indicating that Marchenko, not respondent, was "Ivan the Terrible." Pet. App. 3a. The special master found that none of those "examples" amounted to fraud on the court (*id.* at 250a-258a). The court of appeals based its finding of "recklessness" on three items of evidence: (i) the Fedorenko protocols (which include an excerpt of the 1945 record of interrogation of Treblinka guard Pavel Leleko, given prior to his execution, and a 1978 statement of former Treblinka guard Nikolai Malagon); (ii) a Polish article about Treblinka; and (iii) internal reports concerning Otto Horn's identification of re-

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[5] The Israeli trial court found that the identification card was genuine and that it established respondent's service at Trawniki. Gov't C.A. App. 578-610. While respondent's appeal to the Supreme Court of Israel was pending, extensive new documentary evidence surfaced that confirmed respondent's Trawniki service. That evidence includes five original German documents identifying respondent by his Trawniki identification number and reflecting his service at the Sobibor death camp and the Maidanek and Flossenburg concentration camps. See Isr. S. Ct. Dec. ¶ 152 (English translation at 128-129; Hebrew original at 107-108). Relying on the identification card and the new evidence, the Supreme Court of Israel confirmed the trial court's decision that respondent served at Trawniki. Isr. S. Ct. Dec. ¶¶ 80-163, 447, 458-461 (English translation at 65-137, Final Portion at 1-2, 20-29; Hebrew original 59-113, 383-384, 393-398).

[6] Significantly, respondent never asserted before the special master that the government committed fraud in presenting the Trawniki evidence, and the court of appeals did not address the matter. Pet. App. 41a-42a.

spondent's photographs. Pet. App. 27a-31a. The special master correctly concluded that none of those three items was fraudulently withheld; instead, they were not disclosed because the government attorneys acting in good faith did not recognize or believe that they should be disclosed. See Pet. 7-10; Pet. App. 250a-258a.

i. As the special master explained, the government attorneys did not perceive the Fedorenko protocols as exculpatory in light of other information in their possession. See Pet. App. 159a-167a. Although the protocols identified a gas chamber motorist named Marchenko (*id.* at 162a-163a), the sum of the available information—including the second Malagon statement—established for those attorneys that Marchenko's first name was Nikolai and that he therefore was not "Ivan the Terrible." See *ibid.*; *id.* at 166a-167a.[7] The special master specifically found that the government attorneys "did not believe that they possessed and withheld exculpatory information" (*id.* at 243a) and further found that they "had a good faith belief that they had met their discovery obligations" (Pet. App. 258a). See Pet. 20-22.[8]

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[7] As the special master observed, the Leleko statement provided the names Marchenko and Nikolai, but it did not "refer to Ivan's notorious acts [and] provided nothing to connect the two names with either Ivan the Terrible or Ivan Demjanjuk." Pet. App. 259a. The protocols themselves do not mention any guard named Ivan. See *id.* at 58a-59a (Leleko excerpt); Gov't C.A. App. 149 (Malagon statement); Pet. App. 64a (reprinted version of Malagon statement).

[8] Respondent argues (Br. in Opp. 17-18) that Norman Moscowitz wrongly withheld the Fedorenko protocols in May 1981 in response to his opposing counsel's "impassioned plea" for information about "Ivan the Terrible." As the special master explained (Pet. App. 163a-167a), in late 1979, Moscowitz considered the possibility that respondent had used the alias Marchenko at Treblinka, or that Marchenko was yet another guard named Ivan. But he rejected both possibilities in the winter of *1980*, after receiving Nikolai Malagon's second statement identifying two gas chamber operators: "Nikolai Marchenko" and "Ivan Demedyuk or Ivan

ii. Respondent's arguments concerning disclosure of the Polish article about Treblinka (Br. in Opp. 8-12) stand on even weaker footing, because the special master found that the government had provided respondent with an English translation of that article in August 1982—more than three years before respondent's extradition to Israel. See Pet. 8, 13 n.10; Pet. App. 129a-130a, 199a-200a. Respondent concedes that the court of appeals erred in stating that the government did not disclose the article until 1992 (Br. in Opp. 10, 12 n.17), but he asserts that "the Polish material without the [Fedorenko] protocols was much less significant." *Ibid.* Respondent's argument rests entirely on hindsight. As the special master explained, the sum of *all* the information available to the government attorneys in 1982 indicated that Marchenko's first name was Nikolai, Pet. App. 166a-167a, and that state of affairs obscured the relationship among the Fedorenko protocols, the Polish materials, and "Ivan the Terrible." See Pet. 20 n.16.[9]

iii. Respondent's arguments concerning reports casting doubt on Otto Horn's identification of respondent (Br. in Opp.

Dem'yanyuk." Gov't C.A. App. 214-216, 850 (second Malagon statement); Pet. App. 65a-67a (same). Thus, at the time respondent made his oral request for information, Moscowitz did not believe that the Fedorenko protocols identified someone other than respondent as Ivan the Terrible. See also Pet. 21 n.17. The special master explicitly found no misconduct on the part of Moscowitz relating to his failure to produce the Fedorenko protocols during or after the denaturalization trial. Pet. App. 252a, 254a-257a. The special master also correctly rejected respondent's claim that the denaturalization decision created a post-judgment obligation on the government to produce the Fedorenko protocols. *Id.* at 258a.

[9] Respondent's criticism of the government attorneys is particularly unwarranted in light of the special master's finding that "[respondent's] attorneys did not adequately pursue every lead the government responses provided, and they, too, are responsible for the outcome of discovery in the denaturalization case." Pet. App. 261a.

12-16) are also misplaced, because the United States did not submit Horn's identification in support of Israel's extradition request, but instead relied on the testimony of six Treblinka survivors to establish probable cause in the extradition proceeding. See Pet. 4. Respondent concedes that fact (Br. in Opp. 14 n.20), but suggests that the Horn identification significantly influenced the denaturalization judgment, which in turn influenced the extradition case (*ibid.*). That chain of reasoning does not withstand scrutiny.[10] In any event, it does not demonstrate fraud on the court. See Pet. 20 n.16.[11]

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[10] The government's denaturalization case against respondent also included respondent's Trawniki identification card, five survivor identifications, and respondent's admission that he had a blood group tattoo (a talisman of SS guards). See *United States* v. *Demjanjuk*, 518 F. Supp. 1362, 1365-1378 (N.D. Ohio 1981). In addition, as the special master noted, respondent's alibi was "so incredible as to legitimately raise the suspicions of his prosecutors that he lied about everything—including his denial that he was Ivan the Terrible." Pet. App. 261a n.598.

[11] Respondent ignores the special master's rejection (Pet. App. 251a) of respondent's claim that Moscowitz acted fraudulently in presenting Horn's testimony at the denaturalization trial. Respondent also neglects to note that, in its discovery responses, the government provided him with the names of the investigators who presented the photospreads to Horn (Gov't S.M. Exh. 4), but that respondent never pursued that information and that the internal reports, far from being exculpatory, state that Horn positively identified both respondent's 1942 Trawniki photograph and his 1951 visa photograph. Pet. App. 73a, 76a. After evaluating the strength of Horn's identification in light of the description of the photospread procedure found in the investigators' reports, the Israeli trial court concluded that the investigators' reports "do not detract from the strength of the identification by Horn." Gov't C.A. App. 564. The Supreme Court of Israel noted that the identification procedure contained "defects," but held that "probative weight should be given to [Horn's] identification, and credibility can be ascribed to it." Isr. S. Ct. Dec. ¶ 349 (English translation at 394-395; Hebrew original at 303). The court also stated that the description of the identification procedure "cannot detract from the basic fact that HORN identified [respondent] as IVAN from Treblinka and persisted in this

3. As this Court recently stated, "'[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice." *Custis* v. *United States*, 114 S. Ct. 1732, 1739 (1994). The court of appeals' ruling, which departs from established law, invites other litigants to bring similar actions under Rule 60(b) attacking the finality of judgments, no matter how old. The result will be a substantial new burden on the courts. This case precisely demonstrates that point. The special master determined that the government attorneys acted in good faith and that nothing uncovered in his extensive investigation "has cast any substantial doubt" on the prior judicial finding that respondent should be denaturalized and deported. Pet. App. 266a. Notwithstanding those findings, the court of appeals found fraud on the court and has called into question respondent's denaturalization, which rests on a 13-year-old judgment. As a result, the final resolution of respondent's immigration status will be subject to protracted relitigation and substantial delay. See Pet. 23-24 & n.18.[12]

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position when he was interrogated in 1980 [.]" *Id.* at ¶ 346 (English translation at 389; Hebrew original at 299).

[12] In the district court, the United States has sought a judicial declaration that the denaturalization judgment against respondent independently rests on the district court's finding that he served at Trawniki. Pet. 23 n.18. Respondent countered that the government's motion was "premature" until the court of appeals' decision finding fraud on the court becomes final. Def. Resp. to the Pltf. Mot. to Reopen Judgment at 4 (filed Feb. 24, 1994). Respondent contends, however, that the court of appeals' decision, once final, will require the district court to vacate the denaturalization judgment and will preclude the government from proceeding anew against him. See Def. Resp. to Pltf. Reply in Support of Mot. to Reopen Judgment at 4 (filed Mar. 18, 1994). Significantly, respondent argues here that review by this Court is also "premature" because the lower courts have not decided the effect of the court of appeals' decision on the denaturalization decision against him (Br. in Opp. 25).

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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